GUTHRIE PROPERTY DEVELOPMENT HOLDING BHD A

v.

BAHARUDDIN HJ ALI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
BALIA YUSOF WAHI J
[CIVIL SUIT NO: S6-22-47-2005]
19 FEBRUARY 2010 B

LEGAL PROFESSION: *Solicitor/client - Duty of care and skill - Firm acted as stakeholder - Breach - Damages to client - Whether Firm owed duty to plaintiff* C

PARTNERSHIP: *Liabilities of partners - Debts and obligations - Firm acted as stakeholder - Whether every partner of firm liable jointly with co-partners - Fifth, sixth and seventh defendants were not partners of Firm when stakeholder monies received - Whether liable - First, second, third and fourth defendants partners in Firm during relevant period - Whether accountable - Partnership Act 1961, ss. 12, 13, 14* D

The plaintiff was a licensed housing developer in the business of property development. The firm of Messrs Baharuddin Ali & Co ('the Firm') was appointed as solicitors in respect of the various sale and purchase agreements between the plaintiff, Highlands and Lowlands Berhad and the respective individual purchasers for various bungalow lots located in an area commercially known as Bukit Jelutong ('the Bukit Jelutong Project'). At all material times, the Firm had been appointed as the plaintiff's solicitors for the purpose of cl.h of the second schedule to the agreements which provided that the purchasers of the bungalow lots were to pay 5% of the purchase price of the lots purchased by them to the vendor's solicitors or stakeholder for payment to the vendor upon presentation of memorandum of transfer with the relevant registry or land office. The defendants were advocates and solicitors of the High Court of Malaya and had practiced as partners in a firm known under the name and style of 'Baharuddin Ali & Co' on various dates. Various purchasers have made payments of the balance 5% of their respective purchase prices to the Firm between the period September 1998 to October 2003 totalling RM1,292,396.98. Without the plaintiff's knowledge or consent, the Firm allowed the Firm's files relating to the agreements to be E F G H I

transferred from the Firm to Messrs Aishah, Kama & Sabri. Despite numerous requests made by the plaintiff, the Firm failed to confirm the exact amount of the stakeholder's sum held by the Firm and failed to account for the whereabouts and existence of the stakeholder's sum in their client's account. The plaintiff contended that by virtue of the Firm's appointment as the advocate and solicitor in charge of the sale and purchase agreements for the project, the first, second, third, fourth, sixth and seventh defendants owed the plaintiff fiduciary duties to act honestly and in good faith and in the best interest of the plaintiff. According to the plaintiff, the defendants had breached their duties as trustees and solicitors of the plaintiff. Thus, the plaintiff claimed for, *inter alia*, the following reliefs (a) a declaration that the first, second, third, fourth, sixth and seventh defendants held the sum of RM1,292,396.98 as stakeholders on trust for and on behalf of the plaintiff pursuant to the various sale and purchase agreements and (b) an account from the fifth defendant with regard to all monies received by the firm of Messrs Aishah Kama & Sabri in relation to the plaintiff's files transferred by Messrs Baharuddin Ali & Co; (c) costs and (d) such further or other relief. The fourth defendant in this case, however, counterclaimed against the plaintiff, asking for a declaration that he never represented the plaintiff in his capacity as an advocate and solicitor and that he was not a trustee and owed no fiduciary duty to the plaintiff and claimed for general damages, costs and such other reliefs as the court deemed fit.

Held:

(1) The Firm was appointed by the plaintiff to act on its behalf in respect of the Bukit Jelutong Project. It was clear from the exhibits tendered that the Firm acted as the stakeholder in the terms of cl.h of the second schedule to the sale and purchase agreement. On the same token, the sum of RM1,292,396.98 had been paid to the Firm as stakeholder. It was evident that the plaintiff had appointed the Firm and not any particular solicitor in the Firm as an individual to act as solicitors for the vendor. The Firm owed a duty to the plaintiff. (para 17)

(2) The defendants were sued individually in their personal capacity as a member of the Firm. Liability of partners in a firm is stipulated under s. 11 of the Partnership Act 1961 wherein any partner of the firm is liable jointly with the other partners for

all debts and obligations of the firm incurred while he is a partner. In this respect it is important to determine the respective positions of the defendants in the firm. The fifth defendant, the sixth defendant and the seventh defendant were never a partner of the Firm during the relevant periods when the stakeholder monies were received by the Firm and as such they were not liable as partners of the Firm. Section 19(1) of the Partnership Act 1961 stipulates that a partner who is admitted as a partner into an existing firm does not hereby become liable for anything done before he becomes a partner. (paras 19, 20 & 22)

(3) As regard the first, second, third and fourth defendants, they were partners in the Firm during the relevant periods when the stakeholder monies were received by the Firm. In respect of the fourth defendant, s. 19(2) of the Partnership Act 1961 provides that a partner who retires from the firm does not cease to be liable for partnership debts or obligations incurred before his retirement. They were therefore accountable for it. On the facts and circumstances of the case and the evidence available, the stakeholder monies were received by the Firm in the course of its business and that the monies so received were misapplied by one of the partners, the second defendant. That made the firm liable under s. 13 of the Partnership Act 1961. Read with s. 14 of the same Act, every partner of the firm was liable jointly with his co-partners and also severally for everything for which the firm while he was partner therein became liable under s. 12 or 13. (para 23)

(4) No stakeholder monies were transferred to the firm of Aishah, Kama & Sabri. The firm's accountant's report supported that. As such there was nothing for the fifth defendant to account for. The evidence merely showed that only a few files of the plaintiff in respect of the Bukit Jelutong Project were transferred to the office of Messrs Aishah Kama & Sabri. (para 24)

(5) The second defendant was a partner in the firm and manages the Shah Alam branch which dealt with the plaintiff's project. The second defendant did not enter appearance and had also not filed any defence. In the premise, the plaintiff was entitled to enter judgment against the second defendant. As for the

A fourth defendant, his liability was only up to the time of his retirement from the Firm and in that respect he should not be liable for the amount of stakeholder monies received by the Firm subsequent to that date. (para 30)

B *[Order accordingly.]*

Case(s) referred to:

Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 HC ***(refd)***

GT Rajan v. Lee Yoke Lay & Anor [1994] 2 CLJ 767 HC ***(refd)***

C *Krishnan v. Abdul Razak & Anor [1968] 1 LNS 60 HC* ***(refd)***

OCBC Bank (M) Bhd & Ors v. Lee Lee Fah & Ors & Another Appeal [2000] 1 CLJ 71 CA ***(refd)***

Legislation referred to:

Partnership Act 1961, ss. 11, 12, 13, 14, 19(1), (2)

D

For the plaintiff - N Segaram (Soo Siew Mei with him); M/s Shearn Delamore & Co

For the 1st, 3rd, 5th, 6th & 7th defendants - James Pragasam (Felicia Ho with him); M/s Ho-Noecker & Pragasam

E *For the 4th defendant - Tunku Farik Ismail (Tan Siok Keng with him); M/s Azim Tunku Farik & Wong*

Reported by Suhainah Wahiduddin

F

JUDGMENT

Balia Yusof Wahi J:

Background

G **[1]** The plaintiff is in the business of property development. It is a licensed housing developer. The firm of Messrs Baharuddin Ali & Co ('the Firm') was appointed as solicitors in respect of the various sale and purchase agreements between the plaintiff, Highlands and Lowlands Berhad and the respective individual purchasers for various H bungalow lots located in an area commercially known as Bukit Jelutong (the Bukit Jelutong Project). At all material times, the Firm had been appointed as the plaintiff's solicitors for the purpose of cl. (h) of the second schedule to the agreements which provides that the purchasers of the bungalow lots were to pay 5% of the I purchase price of the lots purchased by them to the Vendor's

solicitors or stakeholder for payment to the Vendor upon presentation of memorandum of transfer with the relevant Registry or Land Office. The defendants are advocates and solicitors of the High Court of Malaya and have practiced as partners in a firm known under the name and style of "Baharuddin Ali & Co" on various dates. The 3rd defendant together with the 5th defendant commenced practice as a partnership under the name and style of Aishah Kama & Co on 1 May 2004 and thereafter change the name of the Firm to Aishah Kama & Sabri. On 1 October 2004 the firm of Baharuddin Ali & Co changes its name to Nor Fairoz Ali & Co. with the 1st, 2nd, 6th and 7th defendants as its partners.

[2] Various purchasers as described in sch. A to the statement of claim, have made payments of the balance 5% of their respective purchase prices to the firm between the period September 1998 to October 2003 totalling RM1,292,396.98.

[3] Without the plaintiff's knowledge or consent, the Firm allowed the Firm's files relating to the agreements to be transferred from the Firm to Messrs Aishah, Kama & Sabri.

[4] Despite numerous requests both oral and written, made by the plaintiff, the Firm, have failed to confirm the exact amount of the Stakeholder's Sum held by the Firm and have failed to account for the whereabouts and existence of the stakeholder's sum in their client's account.

[5] The plaintiff claims for the following reliefs:

i. A declaration that the 1st, 2nd, 3rd, 4th, 6th and 7th defendants hold the sum of RM1,292,396.98 as stakeholders on trust for and on behalf of the plaintiff pursuant to the various sale and purchase agreements between the plaintiff, Highlands and Lowlands Berhad and the respective individual purchasers for the purchase of Bungalow Lots located at Title No. CT 27438, CT 5020. G16262, G16263, G20427, Lot No. 1160, 697, 1152, 1153, 1215 in the Mukim of Damansara, District of Klang in the State of Selangor, which development is commercially known as "Bukit Jelutong".

ii. An account of the sum of RM1,292,396.98 held by the 1st, 2nd 3rd, 4th, 6th and 7th defendants as stakeholders on trust for and on behalf of the plaintiff including copies of all fixed

deposit certificates, bank statements and/or statements from financial institutions where the sum of RM1,292,396.98 is being held.

iii. An account for all interest earned by the 1st, 2nd, 3rd, 4th, 6th and 7th defendants on the said sum of RM1,292,396.98 from the date of receipt of the monies from the purchasers to the date of judgment.

iv. An account from the 5th defendant with regard to all monies received by the firm of Messrs Aishah, Kama & Sabri in relation to the plaintiff's files transferred by Messrs Baharuddin Ali & Co to Messrs Aishah, Kama & Sabri relating to the Bungalow Lots located at Title No. CT 27438, CT 5020, GI6262, F12623, G20427, Lots No. 1160, 697, 1152, 1153, 1215 in the Mukim of Damansara, District of Klang in the State of Selangor, which development is commercially known as "Bukit Jelutong".

v. Costs.

vi. Such further or other relief as this Honourable Court deems fit.

The Evidence

[6] The Assistant Vice President, Credit Management Department of the plaintiff gave evidence that the plaintiff has appointed the Firm as solicitors for the plaintiff in the sale and purchase agreement in respect of the Bukit Jelutong project. Exhibits P3, P4, P6, P7, P8 and P9 are some of the documents showing the sale and purchase agreements and communications between the plaintiff and the firm indicative of the relationship and the transactions between them. It further proved the receipt of stakeholder monies by the Firm in respect of the said sale and purchase agreements. On various occasions the witness spoke to the second defendant and the legal assistants in the Firm. He stated that the Firm collects the 5% purchase price in accordance with cl. (g) or (h) of the second schedule to the sale and purchase agreements. Between 2003 and 2004 the plaintiff made numerous requests and queries to the Firm about the stakeholder money as by that time the memorandum of transfer for the respective purchasers were ready for presentation. The Firm was not able to account for this. Exhibits P10, P11, P12

relate to such communications. By a letter dated 2 September 2004 the Firm replied that the files has been transferred to Messrs Aishah Kama & Sabri but was not able to account for the stakeholders money (exh. P13). Subsequently demands were made by the plaintiff for the Firm to account for the stakeholders money. The first defendant informed the plaintiff that a police report has been lodged against the second defendant (exh. P15) and prepared a statutory declaration in exh. P16 informing the plaintiff the position of the matter. Subsequent to the filing of this suit, the second defendant has forwarded a cheque for RM500,000 to the plaintiff sometime in 2008.

[7] Except for the second defendant, all the other defendants in the case gave evidence. The second defendant chose to be absent during the trial.

[8] The first defendant testified that the Firm has several branches and each branch was managed independently by the partners and each branch maintained its own clients account. He is a co signatory to all cheques above RM25,000 in all the branches.

[9] The Bukit Jelutong project is handled by the Shah Alam PKNS Branch which was managed by the second defendant. It ceased operation on 30 June 2005. When the branch was closed down the plaintiff's files were transferred to Messrs Aishah Kama & Sabri and it was discovered that there were no funds available in the branch clients accounts and no funds were transferred to the firm of Messrs Aishah Kama & Sabri. He testified that any wrongdoings in the branch was done by the second defendant who acted on a frolic of his own. The Firm changes its name to Nor Fairoz Ali & Co on 1 October 2004 with him, the 6th and 7th defendants as partners.

[10] The sixth defendant joined the Firm's Kuala Lumpur office on 18 August 2004 and became a partner of the Firm on 15 September 2004 and still remained a partner when the Firm changed its name to Nor Fairoz Ali & Co on 1 October 2004. While in the Firm, she never had any dealing with the plaintiff.

[11] The seventh defendant joined the Firm Kuala Lumpur office on 25 August 2004 and became a partner on 15 September 2004 and still remained a partner when the Firm changed its name to Nor Fairoz Ali & Co on 1 October 2004. Like the sixth defendant, she never had any dealing with the plaintiff while she was in the Firm.

[12] The fifth defendant was a legal assistant in the Firm since 1 August 2000. On 1 May 2004, together with the third defendant she set up Messrs Aishah Kama & Co and later changed it to Messrs Aishah Kama & Sabri on 1 August 2004. When the Shah Alam Branch of the Firm was closed down on 30 June 2004, she took over files from the Firm together with the plaintiff's files. To borrow her own words, she took the plaintiff's files "on social conscience basis". Only a few files were taken and she asserts that no payment was made for her services. She stated and confirmed that stakeholder money were paid to the Firm as per the sale and purchase agreements but no such moneys were transferred to her firm of Messrs Aishah Kama & Sabri and neither was any accounts given to her. Exhibit D20 is a letter from her firm informing the plaintiff about the matter, while exh. D24 is the accountant's report for the firm of Messrs Aishah Kama & Sabri for the year ending 31 December 2004 showing no transfer of the stakeholders money to the firm.

[13] The third defendant started as a legal assistant in the Firm in 1994 and became a partner on 1 September 1997 and headed the Klang Branch of the Firm. She left the Firm on 1 May 2004 to join the fifth defendant to set up Messrs Aishah Kama & Co which later changes its name to Messrs Aishah Kama & Sabri on 1 August 2004. She confirms the first defendant's evidence that each branch is managed separately and independently and maintained its own clients account and was aware of the goings on in the Shah Alam Branch where the plaintiff's files were located and knew the stakeholders moneys were kept in various bank accounts. However, she was not particularly aware of two bank accounts in Bank Islam and the Bank Kerjasama Rakyat. She also confirmed Messrs Aishah Kama & Sabri took over a few files from the Shah Alam Branch of the Firm and conducted the matter on a "social conscience basis" and stated further that no stakeholder monies were transferred to the firm of Messrs Aishah Kama & Sabri.

[14] The fourth defendant joined the Firm as a legal assistant in 1995 and became a partner on 1 January 1996. He managed the Wisma MBSA and the Seksyen 13 Shah Alam Branches until his resignation from the Firm on 31 December 2002. According to him, the second defendant was solely responsible for the running of the Shah Alam branch and was personally dealing with the plaintiff in

respect of the Bukit Jelutong Project. In having his own personal account in Bank Islam and Bank Kerjasama Rakyat, the second defendant was acting on a frolic of his own and for his own advantage and the fourth defendant claims he only knew about the second defendant's misconduct after receiving the writ of summons from the plaintiff. He contends he was never at anytime appointed by the plaintiff to handle the Bukit Jelutong Project.

[15] In his counterclaim against the plaintiff, the fourth defendant is asking for a declaration that he never represented the plaintiff in his capacity as an advocate & solicitor and that he is not a trustee and owes no fiduciary duty to the plaintiff. He is also asking for general damages, costs and such other reliefs as the court deems fit.

[16] The plaintiff contends that by virtue of the firm's appointment as the advocate and solicitor in charge of the sale and purchase agreements for the project, the first, second, third, fourth, sixth and seventh defendants owe the plaintiff fiduciary duties to act honestly and in good faith and in the best interest of the plaintiff. Not to place themselves in a position in which their personal interest might conflict with the plaintiff's interest and to act in accordance with the terms of the agreements with respect their duties as stakeholders. The defendants has therefore breached their duties as trustees and solicitors of the plaintiff. In so far as the fifth defendant is concerned, the plaintiff contends she should be accountable for all the monies received by the firm of Messrs Aishah Kama & Sabri in relation to the plaintiff's files transferred by the Firm to Messrs Aishah Kama & Sabri relating to the Bukit Jelutong Project.

Findings Of The Court

[17] On the totality of the evidence, it is my finding that the Firm was appointed by the plaintiff to act on its behalf in respect of the Bukit Jelutong Project. It is clear from the exhibits tendered that the Firm acts as the stakeholder in the terms of cl. (h) of the second schedule to the sale and purchase agreement. On the same token, I am also satisfied that the sum of RM1,292,396.98 has been paid to the Firm as stakeholder. It is evident that the plaintiff appointed the Firm and not any particular solicitor in the Firm as an individual to act as solicitors for the vendor. The Firm owes a

duty to the plaintiff. In *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460, [1989] 3 MLJ 434 the court held under headnote 5:

> Under the general law, the relationship of solicitor and client gave rise to a duty as a solicitor to exercise that care and skill on which he knew his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and, which, at the solicitor's invitation, the client had relied on him to do.

Under headnote 1 of the same, the court held:

> Generally the duty of a stakeholder is to hold the stake *in medio* pending the outcome of a future event; he holds it as trustee for both parties to await that event and until that event is known, it is his duty to keep it in his own hands. This was the position the second defendant held itself out to be in when the money was released to it.

[18] Siti Norman JCA (as she then was) in the Court of Appeal in *OCBC Bank (M) Bhd & Ors v. Lee Lee Fah & Ors & Another Appeal* [2000] 1 CLJ 71; [2000] 1 MLJ 134 at p. 143 asked what the liability of a stakeholder is, and stated:

> ... I next ask what is the liability of a stakeholder? That question was also asked and answered by Lord Denning MR in his dissenting judgment in the case of *Burt v. Claude Cousins & Co Ltd & Another* [1971] 2 QB 426 at p 435 as follows:
>
> > If an estate agent or a solicitor, being duly authorized in that behalf, received a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event.
>
> This decision has been accepted with approval in our courts as seen from the cases of *Toh Theam Hock and Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256 ...

The court of Appeal held at headnote[5] that:

> The solicitors as stakeholder were legally bound to pay out the balance of the purchase price deposited with them to the respondents once the transfer and charges over the lands had been registered - events that triggered their liability to pay out balance of the purchase money in their hands. The loss of the balance

purchase price had to be borne by the stakeholders and no other person. The respondents had to look at the stakeholders to account and not to the company (purchaser). A

[19] The defendants in the instant case are sued individually in their personal capacity as a member of the Firm. Liability of partners in a firm is stipulated under s. 11 of the Partnership Act 1961 wherein any partner of the firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner. In this respect it is important to determine the respective positions of the defendants in the Firm. Schedule A of the statement of claim show the various dates of the stakeholder's confirmation of receipt of monies. Comparing these dates of receipts with the position of the respective defendants in the Firm is crucial in determining their respective liabilities. B C

[20] The fifth defendant was never a partner of the Firm. She was only a legal assistant. She left to set up the firm of Aishah Kama & Co on 1 May 2004 which subsequently changed its name to Aishah Kama & Sabri on 1 August 2004. D

[21] Both the sixth and seventh defendants only became partners of the Firm on 15 September 2004 which later changed its name to Nor Fairoz Ali & Co. on 1 October 2004. E

[22] All these three defendants were never a partner of the Firm during the relevant periods when the stakeholder monies were received by the Firm and as such they are not liable as partners of the Firm. Section 19(1) of the Partnership Act 1961 stipulates that a partner who is admitted as a partner into an existing firm does not thereby become liable for anything done before he becomes a partner. F

[23] As regard the first, second, third and fourth defendants, it is very obvious that they were partners in the Firm during the relevant periods when the stakeholder monies were received by the Firm. In respect of the fourth defendant, s. 19(2) of the Partnership Act 1961 provides that a partner who retires from the firm does not cease to be liable for partnership debts or obligations incurred before his retirement. They are therefore accountable for it. It is no defence to say that the second defendant was on a frolic of his own. On the facts and circumstances of the case and the evidence available, I find that the stakeholder monies were received by the G H I

A Firm in the cause of its business and that the monies so received were misapplied by one of the partners, the second defendant. That makes the firm liable under s. 13 of the Partnership Act 1961. Read with s. 14 of the same Act, every partner of the firm is liable jointly with his co partners and also severally for everything for
B which the firm while he is a partner therein becomes liable under s. 12 or 13. Section 14 makes every partner of the firm liable for the liability of the firm while he is a partner.

[24] On the evidence available, I am also satisfied that no
C stakeholder monies were transferred to the firm of Aishah Kama & Sabri. The firm's accountant's report for the year ending 31 December 2004 in exh. D24 supports that. As such there is nothing for the fifth defendant to account for. The evidence merely shows that only a few files of the plaintiff in respect of the Bukit
D Jelutong Project were transferred to the office of Messrs Aishah Kama & Sabri.

[25] The second defendant was a partner in the firm and managed the Shah Alam Branch which deals with the plaintiff's project. The branch was closed on 30 June 2004. The second defendant did not
E enter appearance and has also not filed any defence. In the premise, the plaintiff is entitled to enter judgment against the second defendant. (See: *Krishnan v. Abdul Razak & Anor* [1968] 1 LNS 60).

[26] In conclusion, I find that only the first, second, third and
F fourth defendants are liable and no liability on the part of the fifth, sixth and seventh defendants. In that respect, I allow prayers 1 and 2 of the plaintiff's statement of claim against the first, second, third and fourth defendants only.

[27] On the authority of *GT Rajan v. Lee Yoke Lay & Anor* [1994]
G 2 CLJ 767, the plaintiff's prayer 3 for an account of all interest earned is not allowed and so is prayer 4, for an account from the fifth defendant.

[28] The fourth defendant's counterclaim is hereby dismissed.
H Costs be awarded to the plaintiff against the first, second, third, and fourth defendants and costs also be awarded to the Fifth, Sixth and Seventh defendants against the plaintiff.

[29] Taking into account the RM500,000 which has been paid to the plaintiff by the second defendant, the said sum ought to be
I deducted from the total amount of the stakeholder monies.

[30] The learned counsel for the plaintiff has also rightly conceded that in so far as the fourth defendant is concerned, his liability is only up to the time of his retirement from the Firm and in that respect he should not be liable for the amount of stakeholder monies received by the Firm subsequent to that date. There are five such receipts as shown in Schedule A of the statement of claim.